



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

Number: **201302041**  
Release Date: 1/11/2013

Date: October 18, 2012

Contact Person:

Identification Number:

Contact Number:

Employer Identification Number:

Form Required To Be Filed:

Tax Years:

UIL: 501.32-00; 501.33-00; 501.36-01

Dear :

This is our final determination that you do not qualify for exemption from federal income tax as an organization described in Internal Revenue Code section 501(c)(3). Recently, we sent you a letter in response to your application that proposed an adverse determination. The letter explained the facts, law and rationale, and gave you 30 days to file a protest. Since we did not receive a protest within the requisite 30 days, the proposed adverse determination is now final.

Since you do not qualify for exemption as an organization described in Code section 501(c)(3), donors may not deduct contributions to you under Code section 170. You must file federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file.

We will make this letter and our proposed adverse determination letter available for public inspection under Code section 6110, after deleting certain identifying information. Please read the enclosed Notice 437, *Notice of Intention to Disclose*, and review the two attached letters that show our proposed deletions. If you disagree with our proposed deletions, you should follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

Letter 4038(CG) (11-2005)  
Catalog Number 47632S

In accordance with Code section 6104(c), we will notify the appropriate State officials of our determination by sending them a copy of this final letter and the proposed adverse letter. You should contact your State officials if you have any questions about how this determination may affect your State responsibilities and requirements.

If you have any questions about this letter, please contact the person whose name and telephone number are shown in the heading of this letter. If you have any questions about your federal income tax status and responsibilities, please contact IRS Customer Service at 1-800-829-1040 or the IRS Customer Service number for businesses, 1-800-829-4933. The IRS Customer Service number for people with hearing impairments is 1-800-829-4059.

Sincerely,

Holly O. Paz  
Director, Exempt Organizations  
Rulings and Agreements

Enclosure  
Notice 437  
Redacted Proposed Adverse Determination Letter  
Redacted Final Adverse Determination Letter



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

Date: August 23, 2012

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

Legend:

B	=	state
D	=	date
G	=	individual
H	=	individual
J	=	individual
M	=	business
N	=	organization
O	=	organization
p	=	dollar amount
q	=	dollar amount
r	=	dollar amount

UIL:

501.32-00
501.33-00
501.36-01

Dear :

We have considered your application for recognition of exemption from federal income tax under section 501(a) of the Internal Revenue Code ("Code"). Based on the information provided, we have concluded that you do not qualify for exemption under section 501(c)(3) of the Code. The basis for our conclusion is set forth below.

**Issues**

Will you operate in a commercial, non-exempt manner? Yes, for the reasons given below.

Are private interests being served resulting in inurement and prohibiting you from qualification under Section 501(c)(3) of the Code? Yes, for the reasons stated below.

**Facts**

You are a B nonprofit, non-stock corporation incorporated on D. Your Articles of Incorporation state that you are organized and operated exclusively for charitable purposes

within the meaning of Internal Revenue Code section 501(c)(3). Your Articles of Incorporation ("Articles") state that your specific purpose is to:

"... [p]artner with local schools, the religious community, and other organizations, to establish workshops to address the causes of the health, fitness, educational and financial problems plaguing this targeted group. The workshops will include but are not limited to, health, fitness, education, and financial awareness."

Your initial board of directors consisted of G (CEO), and H, (secretary and treasurer), who are husband and wife. G is a certified tutor, works in the field of fitness and weight management and is certified as a trainer by the American Counsel on Exercise. She is founder and owner of M, a for profit entity that provides health and wellness training services. She provides professional nutrition consultation and fitness training to corporations, churches, local communities, and personal clients. H is certified in radio marketing, and in foreclosure counseling and loan modification through O. On request, you added J as an additional board member, listed as your community outreach officer. Her duties were given as building, cultivating and sustaining new and existing business relationships as a community outreach officer. J is not related by family to G or H; G had collaborated to provide services for J's non-profit entity (N).

You submitted copies of your agenda/minutes from board meetings already held. Despite the addition of J as a new board member, no notation of this was included in your minutes, no vote was held on the inclusion of J, and J has been absent from the three documented meetings held since her addition. When asked of J's involvement with your operations to date, you indicated "board member, founder of N".

Given that two of the three members of your board are related, we asked you to explain the enforcement and validity of your conflict of interest policy. You stated "monitoring by the board".

Your Bylaws state that your board would consist of no fewer than two directors, and while the term for a director was two years, they could serve indefinitely.

You stated you would conduct workshops to provide the following:

1. Form collaborative partnerships with other community based organizations and other entities geared toward enhancing the lives and health of youth, adults and seniors and those underserved in their communities.
2. Advocating for the necessary changes in policy and funding to improve the quality of life and services to those youth, adults and seniors in need of the necessary resources to help them to become productive citizens in their communities.

3. Implement, grow, and sustain various programs that will address the needs of underserved youth, adults and seniors in the community.
4. Help youth, adults and seniors transform their lives through increased education and awareness.

Workshops are conducted in various community places. Each workshop focuses on one topic and are open to the public. There are no fees for any of the workshops.

You also planned to conduct foreclosure counseling for homeowners in distress. You provided the details of your foreclosure counseling as follows:

A seasoned foreclosure counselor will explore a wider variety of intervention operations available to homeowners in distress. You will focus on loss mitigation tools determined to be the least understood or utilized in today's foreclosure environment. Counselors will identify the most critical financial factors in foreclosure cases and then suggest the loss mitigation tool that best addresses a homeowner's mortgage problems. Additional resources on the most recent foreclosure initiatives created to assist homeowners are also provided.

You further provided copies of various forms and worksheets that you use to negotiate with lenders. However, you dropped the activities of mortgage loss mitigation, loan modification, mortgage foreclosure intervention, financial counseling and the like in your response letter –stating H was no longer available to conduct these activities. In addition to that, you stated that you will move forward solely with the activities of health and fitness, which now accounts for 100% of your efforts and budget in the areas of health and fitness. This activity is carried out by G at public venues.

You described your health and fitness activities as “health and fitness. Contacting those that want to attend the class and teaching them, once they arrive. ” You will conduct these activities “when and where attendees were available”, however, you had previously stated your operations were run out of the home of G and H. Dates and times of classes were to be determined, but would usually be on the weekend. Depending on the class, fees may or may not be charged, despite your statement that no fees would be charged for workshops. You did not state what the actual fees to be charged would be. You did state you hoped to solicit some donations or grants. When asked who would conduct this service, you indicated, “G, no salary/wages”. You detailed the work hours and compensation of your board as “varies, no compensation”.

When asked for details on operations that were more complete you submitted the exact same responses.

You submitted three different sets of financial data as well as separate details on income

and expenses. Your initial financial data was dated prior to your submission of Form 1023. Despite this, your actual income and expenses given changed three times. Further, despite the separate details provided regarding expenses paid to and incurred by G and H, your last set of financial data shows zero income and expenses for the two years you have been in existence. You did list separate income and expenses which showed G had been paid a total of p dollars for varying services. Further, H had incurred q dollars and G r dollars for professional certifications. When asked for further details about compensation at a later date, you stated you did not pay for the certifications of G or H, nor was there any compensation.

### **Law**

Section 1.501(c)(3)-1(a)(1) of the regulations provides that, in order to be exempt as an organization described in section 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational test or the operational test, it is not exempt.

Section 1.501(c)(3)-1(c)(1) of the regulations provides that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities that accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Section 1.501(c)(3)-1(c)(2) of the regulations provides that an organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals. Section 1.501(a)-1(c) of the regulations defines the words "private shareholder or individual" in section 501 to refer to persons having a personal and private interest in the activities of the organization.

Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides that an organization is not organized or operated exclusively for one or more exempt purposes unless it serves a public rather than a private interest. Thus, to meet the requirements of this subsection, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests, such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.

Rev. Proc. 2012-9; 2012-2 I.R.B. 261, Section(4)(.03); Exempt status may be recognized in advance of the organization's operations if the proposed activities are described in sufficient detail to permit a conclusion that the organization will clearly meet the particular requirements for exemption pursuant to the section of the Code under which exemption is claimed.

- (1) A mere restatement of exempt purposes or a statement that proposed activities will be in furtherance of such purposes will not satisfy this requirement.

- (2) The organization must fully describe all of the activities in which it expects to engage, including the standards, criteria, procedures, or other means adopted or planned for carrying out the activities, the anticipated sources of receipts, and the nature of contemplated expenditures.
- (3) Where the organization cannot demonstrate to the satisfaction of the Service that it qualifies for exemption pursuant to the section of the Code under which exemption is claimed, the Service will generally issue a proposed adverse determination letter or ruling.

In B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978), the court found that a corporation formed to provide consulting services did not satisfy the operational test under section 501(c)(3) of the Code because its activities constituted the conduct of a trade or business that is ordinarily carried on by commercial ventures organized for profit. Its primary purpose was not charitable, educational, or scientific, but rather commercial. In addition, the court found that the organization's financing did not resemble that of the typical section 501(c)(3) organizations. It had not solicited, nor had it received, voluntary contributions from the public. Its only source of income was from fees from services, and those fees were set high enough to recoup all projected costs and to produce a profit. Moreover, it did not appear that the corporation ever planned to charge a fee less than "cost." And finally, the corporation did not limit its clientele to organizations that were section 501(c)(3) exempt organizations.

In La Verdad v. Commissioner, 82 T.C. 215 (1984), an organization was formed to provide education and charity, but failed to provide sufficient details regarding its proposed operations. The court held that it failed to prove that it would operate exclusively for exempt purposes under section 501(c)(3) of the Code.

In Airlie Foundation v. Commissioner, 283 F. Supp. 2d 58 (D.D.C., 2003), the court relied on the "commerciality" doctrine in applying the operational test. Because of the commercial manner in which this organization conducted its activities, the court found that it was operated for a nonexempt commercial purpose, rather than for an exempt purpose. The court stated that among the major factors courts have considered in assessing commerciality are competition with for profit commercial entities; extent and degree of below cost services provided; pricing policies; and reasonableness of financial reserves. Additional factors include, inter alia, whether the organization uses commercial promotional methods (e.g., advertising) and the extent to which the organization receives charitable donations.

New Dynamics Foundation v. United States, 70 Fed. Cl. 782 (2006), was an action for declaratory judgment that the petitioner brought to challenge the denial of his application for exempt status. The court, in finding that the actual purposes displayed in the administrative record supported the Service's denial, stated "It is well-accepted that, in initial qualification cases such as this, gaps in the administrative record are resolved against the applicant." The court noted that if the petitioner had evidence that contradicted these findings, it should

have submitted it as part of the administrative process. The court also highlighted the principle that exemptions from income tax are matters of legislative grace.

### **Application of Law**

Section 501(c)(3) of the Code sets forth two main tests for an organization to be recognized as exempt. An organization must be both organized and operated exclusively for purposes described in section 501(c)(3). Section 1.501(c)(3)-1(a)(1) of the regulations.

An organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities that accomplish one or more of such exempt purposes specified in section 501(c)(3) of the Code. Section 1.501(c)(3)-1(c)(1) of the regulations. You did not provide sufficient information to permit us to determine how your planned activities will advance these purposes. You have indicated you will offer health and wellness workshops to anyone in the community, possibly for a fee, at an undisclosed location. You have not distinguished your operations as any different from the for profit entity owned and run by G. You do not meet the regulations and have failed to establish your operations are exempt.

Rev. Proc. 2012-9 states that exempt status may be recognized in advance of the organization's operations if the proposed activities are described in sufficient detail to permit a conclusion that the organization will clearly meet the particular requirements for exemption pursuant to the section of the Code under which exemption is claimed. Despite multiple requests for information, only short, terse and in some circumstances contradictory responses were provided. We are unable to conclude the full details of the programs you intend to conduct, who will conduct, or where. For example, you stated in your response that you will drop the housing counseling activity and other community related activities leaving health and fitness programs as your only activity. You were then asked to describe your health and fitness activities in further details. You did not provide this information. Similarly, you were asked to provide a fee schedule for your programs, J's involvement and role within your organization, and ,multiple times requested financial data. You either failed to provide information or submitted inadequate responses. Therefore, you failed to provide an adequate basis for us to determine that you are organized and operated exclusively for exempt purposes. See La Verdad v. Commissioner.

There are several contradictions and inconsistencies in your Application. For example, you show no compensation or reimbursements to your governing members on pages 2 and 9 of your Application. However, you stated that you would pay G and H for their services and certifications in your response. Then you stated later that you did not pay for their certification. Similarly, you stated in one response that there will be no fee for any of the workshops. In another response, you stated that the fee depends on the class. You stated activities would take place in the home of G and H, then indicated locations were unclear. You are similar to the organization in New Dynamics Foundation v. United States, above because of the inconsistent, vague, or nonspecific information you provided is not sufficient enough to establish entitlement to tax-exempt status.



Section 1.501(c)(3)-1(c)(2) of the regulations provides that an organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals. Your operations inure to the benefit of G and H. Further, Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides that an organization is not organized or operated exclusively for one or more exempt purposes unless it serves a public rather than a private interest. There are several indicators in your Application that you are operating for the benefit of G and H.

You have two related board members out of three. These two conduct almost all of your activities with complete control over you. J is an unrelated minority in your board. In addition, your board minutes do not indicate that J exercised her rights over any important decisions such as business with insiders. In fact you failed to provide any board minutes which shows how your board members were elected. You failed to show that you are an independent organization from G's health and wellness business. Your sole activity is providing health and wellness training performed by G, which is exactly what G does in her for-profit business. You indicated personal certifications were paid for. You then submitted contradictory statements that expenses and compensation were paid, then not paid. You have been unable to document that you have not provided benefits to insiders. Overall, through various contradictions and lack of complete information you have been unable to document that G's related for profit entity or G herself will not benefit from your operations. You have failed to show how your operations serve a public rather than a private interest.

You are similar to the organizations in Airlie Foundation and B.S.W. Group in that you will operate in a commercial manner. You do not limit your services to the poor or distressed. G, your CEO, is a certified trainer as well as the founder and owner of M, a for profit entity that provides health and wellness training services. You appear to be conducting the same services as her for profit. While you have provided contradictions on the subject, it appears you will be charging fees for these workshops as you expect only a small portion of revenue through contributions. The location of these workshops was not made clear, but you have previously stated activities would be conducted from the home of G and H, the same as G's for profit entity. You are in competition with for-profit entities providing similar services, for a fee, and operate in a manner similar to a commercial business. You have been unable to fully distinguish yourself from the business owned and operated by G, a for profit providing personal health and wellness programs. Accordingly, your operations are indistinguishable from a commercial business.

### **Conclusion**

Based on the facts and information provided, you are not operated exclusively for exempt purposes. You operate in a commercial manner, your activities result in inurement to G and H, and you have failed to establish your operations are tax exempt. Accordingly, you do not qualify for exemption as an organization described in section 501(c)(3) of the Code.

You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must

submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination. If your statement does not provide a basis to reconsider our determination, we will forward your case to our Appeals Office. You can find more information about the role of the Appeals Office in Publication 892, *Exempt Organization Appeal Procedures for Unagreed Issues*.

Types of information that should be included in your appeal can be found on page 2 of Publication 892. These items include:

1. The organization's name, address, and employer identification number;
2. A statement that the organization wants to appeal the determination;
3. The date and symbols on the determination letter;
4. A statement of facts supporting the organization's position in any contested factual issue;
5. A statement outlining the law or other authority the organization is relying on; and
6. A statement as to whether a hearing is desired.

The statement of facts (item 4) must be declared true under penalties of perjury. This may be done by adding to the appeal the following signed declaration:

"Under penalties of perjury, I declare that I have examined the statement of facts presented in this appeal and in any accompanying schedules and statements and, to the best of my knowledge and belief, they are true, correct, and complete."

Your appeal will be considered incomplete without this statement.

If an organization's representative submits the appeal, a substitute declaration must be included stating that the representative prepared the appeal and accompanying documents; and whether the representative knows personally that the statements of facts contained in the appeal and accompanying documents are true and correct.

An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you during the appeal process. If you want representation during the appeal process, you must file a proper power of attorney, Form 2848, *Power of Attorney and Declaration of Representative*, if you have not already done so. You can find more information about representation in Publication 947, *Practice Before the IRS and Power of Attorney*. All forms and publications mentioned in this letter can be found at [www.irs.gov](http://www.irs.gov), Forms and Publications.

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to appeal as a failure to exhaust available administrative remedies. Code section 7428(b)(2) provides, in part, that a declaratory judgment or decree shall not be issued in any

proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted all of the administrative remedies available to it within the IRS.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

Please send your protest statement, Form 2848, and any supporting documents to the applicable address:

Mail to:

Internal Revenue Service  
EO Determinations Quality Assurance  
Room 7-008  
P.O. Box 2508  
Cincinnati, OH 45201

Deliver to:

Internal Revenue Service  
EO Determinations Quality Assurance  
550 Main Street, Room 7-008  
Cincinnati, OH 45202

You may fax your statement using the fax number shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he or she received your fax.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

Holly O. Paz  
Director, Exempt Organizations  
Rulings and Agreements

Enclosure, Publication 892